Supreme Court of the United States
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-263

LIBBEY-OWENS-FORD COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA IN OPPOSITION

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Other Authority Cited

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Opinions Below

The National Labor Relations Board's original Unit Clarification Decision and Direction of Elections (Case No. 6-UC-4) is reported at 169 NLRB No. 2 (1968) (App.

A of Petition). The Board issued a Supplemental Decision and Order Clarifying Unit which is reported at 173 NLRB No. 187 (1960) (App. B of Petition). The Board's decision and Order dismissing the refusal to bargain charge (App. C of Petition) is reported at 189 NLRB No. 138 (1971).

The Decision of the Court of Appeals for the Third Circuit remanding the case to the Board (App. D. of Petition) is reported at 463 F. 2d 31 (3 Cir. 1972). The Board then issued a Supplemental Decision and Order in which it reaffirmed its underlying unit determination (202 NLRB No. 15 (1973)) (App. E of Petition). The Decision of the United States Court of Appeals for the Third Circuit enforcing the Board's Order (App. F of Petition) is reported at 495 F. 2d 1195 (3 Cir. 1974). The Court of Appeals unreported Denial of Petitioners Petition for Rehearing (June 13, 1974) is found at Appendix G of Petition.

Jurisdiction

Petitioner adequately set forth the jurisdictional requisites.

Questions Presented

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to honor a prior Board unit clarification which merged existing single-plant units, appropriate for bargaining, into a multi-plant unit, also found appropriate by the Board.

Statutes Involved

The Petition adequately sets forth Sections 9(a), (b), and (c)(1) of the National Labor Relations Act, as amended. However, Sections 8(a) (1) and (5) of the Act are also involved.

Section 8(a) of the Act provides:

> "It shall be unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.
>
> * * *
>
> (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a).

Counter-Statement of the Case

The Union was first certified as representative of the production workers of the Employer on January 30, 1939 (10 NLRB 147) in a multiplant unit which has grown by the addition of other plants since then. By July 13, 1966, the Employer and Union were bargaining in 3 units as follows:

1. A multiplant unit of 8 plants in Ohio, Illinois, West Virginia and Louisiana;
2. A single plant unit at Brackenridge, Pennsylvania (known as Liberty Mirror Plant); and
3. A newly constructed single plant at Lathrop, California.

On July 13, 1966 the Union filed a unit clarification petition (6-UC-4) asking the Board to clarify the multiplant

unit by adding thereto both the Lathrop, California and Brackenridge, Pennsylvania plants.

A formal representation hearing w s held at Pittsburgh, Pennsylvania on September 8 and , 1966. During the hearing an extensive stipulation was put in concerning the history of labor relations in the various plants. From this stipulation and the testimony at the hearing the following data is assemble[1]:

Plant No.	*Location*	*No. of Employees Represented by Petitioner*[1]	*Local Union No.*	*Miles Distant Fr Home Offi (Toledo Oh*
4	Toledo, Ohio	1,017	9	4
8	Toledo, Ohio	1,315	9	4
6	Rossford, Ohio	2,329	9	5
9	Rossford, Ohio	325	9	5
16	Brackenridge, Pa.	383	33	240
5	Ottawa, Ill.	711	19	291
7	Ottawa, Ill.	947	19	291
1	Charleston, W. Va.	826	1	305
2	Shreveport, La.	584	5	986
10	Lathrop, Calif.	452	418	2,267
	Total	8,889		

[1] Figures are as of June 30, 1966. At Plant 1, 115 glass cutters and at Plant 2, 66 glass cutters are represented by the Window Glass Cutters League of America in an old craft unit; all other workers except supervisors and clerical employees are represented by the petitioner.

[2] Plants are arranged in this list in order of increasing distance from the Employer's home office in Toledo, Ohio.

The Employer's witnesses testified that one important reason (if not the most important) in resisting amalgamation of all 10 plants into 1 unit was that at Brackenridge, Pa. female employees amounted to over 50% of the work force; that females in plants Nos. 8 and 7 totalled 181 and that females in the 8 plant multiplant unit (including Plants 7 and 8) totalled 240 out of a total employment of 8,056, whereas in Brackenridge alone females amounted to 55% of the employees and males only 45% and total employment there was 383 employees. The Employer was much concerned to find that female employees are less concerned about pension than in immediate money payments. On October 18, 1966 the Regional Director issued his Order transferring the case to the Board.

One year and 3 months later, on January 12, 1968 the Board issued its Decision and Direction of Election (3 to 2) directing elections not in the 8 plants covered by the multiplant contract, but Globe type elections separately in the single plant units of the Brackenridge, Pennsylvania plant and of the Lathrop, California plant, the question on the ballots to be "whether or not the employees now separately represented by the petitioner wish to be represented by that Union as part of the multiplant" unit now existing.[3]

The majority of the Board found that separate plant units and an employer-wide unit are equally presumptively appropriate.[4] However, separate historical units do not *automatically* merge where the operations are not integrated or the parties do not mutually intend to effect a

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[3] 169 NLRB No. 2.

[4] Citing in fn. 10 *Owens-Illinois Glass Co.*, 136 NLRB 389, 392.

consolidation. Here, the Employer had not only failed to agree to such a merger, but vigorously opposed it on various grounds. The Board found no merit in the Employer's position that the Union was required to resort to a representation proceeding to resolve the issue; and held that while the Board could reach and determine such an issue in a representation case, there was no reason why that should be the only route for the resolution of the question: and that it was not the best route either, where, as in this case, there was no actual question concerning representation because the Employer does not dispute the Union's representative status at any of the plants.

The majority of the Board therefore concluded:

> "We conclude from the above review of outstanding principles and the arguments herein that the Petitioner has adopted a procedure which would appear to encompass its desired relief. We are unable to perceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and only the technical problems of bargaining history and employer opposition have prevented its establishment."

The majority of the Board further stated that:

> "Nor, in considering the equities of the positions of the Employer and of the Union, does there appear to be any justification, in the circumstances here, for affording absolute power to either one to compel the other to bargain in the three historical units rather than combining them into one presumptively appropriate employer-wide unit of glass industry plants. Thus the existing multiplant unit is virtu-

> ally employer-wide, and there is no question that the Petitioner represents the employees at all the 10 plants. In a dispute such as this, it appears to us that the wishes of the disputed employees themselves should be so solicited and that some means should be afforded by which they may indicate their desires. Indeed, such a need is suggested by the Employer's criticism of a possible grant of the Union's request in its argument that a proceeding under 9 (c) would give such an opportunity. Further, an outright rejection of this petition would leave the parties with no early sources of relief by which the Unit issue may be resolved and would serve merely to prolong the labor dispute. Such a result would unquestionably fail to promote the purposes and policies of the Act and would constitute a failure by this Board to fulfill its statutory function to decide in each case the appropriate unit and to afford a peaceful means for doing so."

The majority of the Board therefore directed the Globe type or self-determination elections only at the Brackenridge, Pa. and Lathrop, Calif. plants to ascertain whether the employees in both or either plant wished to be added to and included in the multiplant unit.

A two member minority of the Board was of the opinion that there was no statutory authority for conducting elections in this kind of situation.

The Employer filed a motion for rehearing and reconsideration which the majority of the Board denied on February 13, 1968 as containing nothing not previously considered by the Board and no issues which were not adequately presented and argued previously.

Delay in holding the directed elections and in issuing the Supplemental Decision and Order Clarifying Unit was occasioned by the Employer's institution of proceedings in the United States District Court for the District of Columbia to restrain the Board from conducting said elections (*Libbey-Owens-Ford Glass Co.* v. *Frank W. McCullough et als.*, Civil Action No. 507-68); and an injunction was granted by the District Court on March 8, 1968.[5] The District Court's decision was based on the conclusion that in directing an election in the 2 plants in the absence of a "question of representation" the Board acted in excess of and contrary to the statutory authority conferred on it by the National Labor Relations Act. The injunction was partially stayed by the Court of Appeals to permit the elections, but the Board was not to issue any order based on the results; and the injunction was subsequently reversed for lack of court jurisdiction[6] and certiorari was denied the Employer.[7]

Meanwhile on March 20, 1968 the directed elections had been held and resulted in the employees voting at the respective Lathrop (573 for and 6 against) and Brackenridge (391 for and 19 against) plants overwhelmingly in favor of becoming part of the multiplant unit.

Finally, on December 10, 1968 the Board (3 to 2) issued a Supplemental Decision and Order Clarifying Unit:[8]

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[5] 57 LC, ¶15,552; 67 LRRM 2712.

[6] *McCullough* v. *Libbey-Owens-Ford Glass Co.*, 403 F2d 916, 131 US App. DC 190 (June 9, 1968).

[7] 393 US 1016 (Jan. 13, 1969).

[8] 173 NLRB No. 187.

therein it found that the appropriate unit for future bargaining was the 10-plant multiplant unit, having enlarged the former 8-plant unit to include the production and maintenance employees at the Lathrop and Brackenridge plants.

During the pendency of the unit clarification proceeding, there was in effect a contract between the employer and the Union covering the 8-plant unit, which was due to expire on October 25, 1968. After the directed elections were held, and on August 12, 1968, the Union, pursuant to the terms of that contract, served notice of termination on the respondent and a request to negotiate a new contract. By letter dated August 16, 1968, to the employer, the Union requested that the Lathrop plant employees be merged with the then existing multiplant unit and advised that, should no agreement be reached on this issue, the Union would exercise its right to strike the Lathrop plant. Thereafter, the Union proposed the inclusion in a new multiplant contract of the Lathrop and Brackenridge plants. The employer, however, ultimately acceded only to the addition of the Lathrop plant to prior 8-plant multiplant unit and that plant was covered by the parties' multiplant contract, effective October 25, 1968, for a term ending October 25, 1971. With respect to the Brackenridge plant, the employer declined to discuss its inclusion because the contract covering those employees had a later expiration date.

In anticipation of the exipration of the Brackenridge, Pa. collective bargaining agreement the Union by letter dated July 24, 1969 had given notice of its expiration and requested negotiations. By letter dated September 25, 1969, the Union expressly requested the inclusion of the Brackenridge unit employees into the multiplant unit but the Employer steadfastly refused to agree thereto. By letter dated September 29, 1969 the Union offered a way

out of the deadlock and on September 30, 1969 served a formal demand upon the Employer that it comply with the Board's order and include the Brackenridge, Pa. employees in the multiplant unit and contract. By letter dated October 1, 1969, the Union informed the Employer that it had no alternative but to litigate the issue of the inclusion of the Brackenridge plant in the multiplant unit. The Employer answered refusing to do so. The Union sent a telegram to its members saying it would institute appropriate proceedings (with copies to Company counsel and Employee Relations Director). Negotiations continued and an agreement was executed February 11, 1970 effective as of October 1, 1969 with special contingent provisions regarding litigation as to whether the Employer was obliged to include the Brackenridge plant in the multiplant unit.[9]

Meanwhile on October 13, 1969 the Union had filed an unfair labor practice charge accusing the Employer of not bargaining in accordance with the Board's decision because it had not agreed to include Brackenridge in the multiplant agreement. On December 31, 1969 General Counsel issued an unfair labor complaint accusing the Employer of violating Sections 8(a)(1) and (5) of the Act by the aforesaid conduct. Meanwhile, as noted above, the Employer and Union had entered into a conditional separate agreement as to Brackenridge. The respondent Employer filed an answer to the complaint challenging the authority of the Board to decide as it did in the UC case.

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[9] These special provisions prevented the question from becoming moot, and prevented the agreement from being deemed a waiver by the Union of its right to insist on its rights under the Board's order.

The Employer filed another motion entitled "Application for Reopening, Reconsideration, Modification or Setting Aside of Orders" etc., which the Board denied by order dated June 8, 1970.

On July 29, 1970 the Trial Examiner filed his Decision finding and concluding that:

> "By refusing to recognize and bargain with the Union, as the duly certified representative of the Brackenridge employees as part of the appropriate clarified multiplant unit since on or about October 1, 1969, the Respondent violated Section 8(a)(5) of the Act and thereby interfered with, restrained and coerced employees in the exercise of guaranteed rights in violation of Section 8(a)(1) of the Act."

The Trial Examiner recommended that the Employer should cease and desist from refusing to recognize and bargain collectively with the Union as the exclusive representative of the Company's employees in a unit consisting of the 10 plants and take affirmative action necessary to effectuate the policies of the Act of bargaining collectively with the Union as the exclusive representative of the Brackenridge plant employees as part of the 10-plant unit.

The Employer filed Exceptions to the Record and Proceedings and to the Trial Examiner's Decision on September 3, 1970. In due course the Board issued its Decision and Order on April 16, 1971.[10] The Board by a vote of 2-1-2 instead of following the former decisions in this case

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[10] The term of 2 members of the former majority of the Board had expired and they were not reappointed; and 2 new members were appointed, one becoming Chairman and both participated in this decision.

voted not to enforce the Decision of the Trial Examiner and, instead, dismissed the complaint.

The former 2 minority members who had dissented from the original decision on January 12, 1968 (members Fanning and Jenkins) now wrote an opinion again finding merit in the Employer's attack on the proceedings on the UC petition, and reaffirmed their dissenting view expressed in the initial decision "for the reasons fully set forth therein" and concluding that the Board was without statutory authority to direct and conduct the elections in that proceeding.

The sole remaining member of the former majority (Brown) adhered to the majority opinion in the underlying unit clarification case, that the elections were valid and the certified unit was properly clarified to include the Brackenridge and Lathrop employees and therefore the Employer violated the Act by refusing to bargain with the Union in the certified unit.

One of the newly appointed members expressed the view that the decisions and determinations of the Board with respect to unit clarification were, for the reasons set forth in the majority opinion in that proceeding, within the scope of the Board's authority and not an abuse of the Board's discretion; and therefore the Employer had violated the Act and he would affirm the Trial Examiner's decision.

The newly appointed Chairman agreed with the former majority on the two major issues: (1) that the statutory authority of the Board included the authority to merge separate units as had been done in this case; and (2) that the original majority was also right in holding that the statute does not prohibit the conduct of such elections; however, while voting with the former minority to dismiss

the unfair labor practice complaint, he expressly rejected the reasoning which led them to that conclusion—he relied upon the fact that the Board had refused since 1968 to follow and apply the UC decision against this Employer "even in cases which were virtually indistinguishable."[11]

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[11] He cited *PPG Industries, Inc.*, 180 NLRB, No. 58; and *Rohm & Haas Company*, 183 NLRB, No. 20. However, when the Board was deciding each of those cases a majority, consisting of the two former minority members plus one member of the old majority joining them, agreed that the doctrine of the UC decision did not apply to each of those cases because factually they were dissimilar, most particularly in that they did not deal with an employer-wide unit, but rather proposed units of part of an employer's plants in this industry; thus, of the 16 plants listed in fns. 5 and 6 and text in the *PPG Industries* decision (180 NLRB, No. 58), it is made clear that the Union was simply seeking to combine into one bargaining unit 4 separately represented plants with its existing 9-plant multiplant unit; of this Employer, out of a total of 16 plants in the industry operated by the Employer, and the petitioner did not represent the units at 4 other glass plants of the Employer, 2 of which were represented by other unions and 2 of which were unrepresented (fns. 13 to 15 and text thereto); the new 3-member majority in that opinion finding expressly that "the multiplant unit * * * sought is not one which the Board would find appropriate on any basis except agreement of the parties". With regard to the other decision cited by the new Chairman (*Rohm & Haas*, 183 NLRB, No. 20), again the unit sought by the Union was not employer-wide, even in its chemical division, but rather was an effort to have the Board combine into one bargaining unit 3 separate bargaining units of employees which it represents, although there is no established multiplant unit and the Union did not represent any employees at the 3 other chemical plants of this employer, some of whom are represented by other unions and some are not represented. The decision was by a 3-member panel consisting of Members Fanning and Jenkins, minority in the UC decisions in L-O-F, and one member from the majority in those cases who joined in voting to dismiss *Rohm & Haas* because he found that the multiplant unit sought over the Employer's objection would not be appropriate under the traditional standards applied by the Board.

The result of this split voting, based on the diversity of expressed reasons, was that there was no majority for any reason later held to be valid; whereas there were 3 votes in favor of the reasons expressed in both opinions in the UC proceedings supporting the position of the Union. Nevertheless, the Board by this 3-member vote dismissed the unfair labor practice charge which the Trial Examiner had sustained.

To review and reverse this odd result the Union appealed to Third Circuit Court of Appeals which heard oral argument and by opinion filed June 21, 1972, vacated the Board's order of dismissal entered April 16, 1971, and directed that the Board reconsider Case 6-CA-4771 in the light of that opinion. The Court gave as its reason that "the reconsideration of [the underlying UC] issue required a finding by at least a majority of the Board of the appropriateness of the units involved". The Court also disposed of 2 additional grounds raised by the Company and held that:

(1) "the Board acted within its statutory authority in conducting a UC proceeding designed to consider the merger of existing collective bargaining units;" and the Court added: "We assume that on remand, given its authority to combine existing units, the Board will consider the desirability of exercising this authority in light of its obligation to select units which will further the policies of the Act".

(2) that the Board had the requisite authority to conduct the election in the absence of a question of representation [In all the plants involved the units were represented by the same Union].

But the Court attached the condition that the Board must first find that two or more units are equally appropriate. The Court recognized that "in the underlying U.C.

procedure [the Board majority] first determined that both the single-plant Brackenridge unit and the employer-wide unit were presumptively appropriate and then ordered the election". However, by reconsidering in 189 NLRB No. 139 (Opinion of April 16, 1971) the U.C. order of 1968, the Board was obligated to express its opinion on the appropriateness of the unit, and a majority of the Board failed to do so. So the Court remanded the matter to the Board so it could rule (by a majority) on the appropriateness of the ten-plant unit.

The Board, by its new Supplemental Decision and Order of March 1, 1973, 202 NLRB No. 15 by a vote of 4-1 stated that:

> "For the reasons stated in the underlying unit clarification decision, we reaffirm the unit determination there made. In our opinion, the Board's finding in that case that the single-plant and multiplant units constituted equally appropriate units for bargaining was proper and correct".

By such back reference the Board incorporated as the basis for its determination all supporting statements in its earlier decisions.

Thus, it said in its initial decision of January 12, 1968, that "an employer-wide unit is * * * presumptively appropriate", citing *Owens-Illinois Glass Co.*, 136 NLRB 389, 392. From the direction of election in that decision Members Fanning and Jenkins dissented. However, these two Board Members joined two other Board Members, so that by a 4-1 vote the Board accepted the "reasons stated in the underlying unit clarification decision".

In between those two decisions, 3 years and 2 months apart, the Board on at least one other occasion made the same ruling; thus, in the Board's Supplemental Decision

and Order Clarifying Unit, dated December 10, 1968 the Board ruled "we find that the appropriate unit for future bargaining is the enlarged multiplant unit [including Lathrop and Brackenridge]."

The Company, however, on April 10, 1973, then filed a Motion for Reconsideration of Board's Supplemental Decision and Order of March 1, 1973, which the Board denied by its Order Denying Motion, dated May 18, 1973 in which the Board stated that in its Supplemental Decision and Order dated March 1, 1973, it had "reaffirmed the unit determination made in the underlying unit clarification decision" (169 NLRB 126 and 173 NLRB 1231).

The company then petitioned the Court of Appeals for review and the Board filed a cross-application for enforcement (with the United Glass Workers intervening). The Third Circuit (Rosenn, J. dissenting) denied the company's petition, holding that the Board's underlying unit determination was supported by substantial credible evidence, and was not arbitrary, discriminatory or inconsistent with Board policy applied in other cases.[12]

On June 13, 1974, the Third Circuit denied without opinion the company's Petition for Rehearing *in banc*.[13]

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[12] *Libbey-Owens-Ford Company* v. *NLRB, et al.*, 495 F2d 1195 (3 Cir. 1974).

[13] *Libbey-Owens-Ford Company* v. *NLRB, et al.*, see App. G of Petition.

ARGUMENT

The decision below, as acknowledged by the petitioner, is one which is unique in that it turns on its own facts and affects few other than the litigants. The Board has refused to conduct similar elections in other cases (See *Pittsburgh Plate Glass Industries*, 180 NLRB 477, 480-481 (1969) (Petition at p. 16)). However, as noted in fn. 11 of the counterstatement of the case *supra* the cases in which the Board has refused to conduct similar elections are easily distinguishable on their facts. The petitioner has not shown disparate treatment by the Board in identical, or even factually similar situations.

Further, the opinions of the Third Circuit and the Board should not be disturbed as it is clear that they are eminently correct and proper.

Congress, via the National Labor Relations Act as amended, bestowed upon employees the right to self-organize and bargain collectively "in respect to rates of pay, wages, hours of employment or other conditions of employment" through representatives of their own choosing. (Section 9(a)). Further, Section 9(b) of the Act directs the Board in each case to determine whether "in order to assure the employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, plant unit, or sub-division thereof." It is rudimentary that the determination of what constitutes an appropriate unit in each instance "involves of necessity a large measure of informed discretion, and *the decision of the Board, if not final, is rarely to be disturbed.*" (emphasis supplied). *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). See also *NLRB* v. *New Enterprise Stone & Lime Co.*, 413 F. 2d 117, 119 (3 Circ. 1969).

The Board has consistently held, in interpreting the above Sections of the Act, that an "employer unit" and a "plant unit" are presumptively appropriate. *Owens-Illinois Glass Co.*, 136 NLRB 389, 392 (1962). In *Western Electric Company, Inc.*, 98 NLRB 1018, 1032 (1952) the Board stated its view of the law as follows:

> "On its face, the unit requested is appropriate because it is co-extensive with the entire Company. A unit of such scope is the first one called appropriate in Section 9(b) of the Act, upon which the Board's authority to establish collective bargaining rests. Apart from situations controlled or affected by special statutory requirements, it is also the basic unit recognized by the Board since its earliest days. Indeed, it may be stated as a general rule that, absent any statutory considerations, the Board does not refuse to grant a company-wide unit to a labor organization unless it is affirmatively shown that a smaller one is more appropriate."

See also *Miratile Mfg. Co.*, 124 NLRB 48, 49-50 (1959) and *Beaumont Forging Co.*, 110 NLRB 2200-2201-2202 (1954).

In *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 156 (1941) the Court held that there may properly be considered a wide variety of factors, and due to the Board's vast discretion the presence or absence of one or even several of these factors is not necessarily controlling. The Court specifically stressed, amongst others, the wishes of the employees. This is especially significant in view of the wide margin by which the employees in the two plants in question (Brackenridge and Lathrop) voted in favor of joining the multi-plant unit.

As the Third Circuit Court of Appeals noted in its thorough opinion (495 F. 2d 1195, 1200; p. 64a of Petition), an appellate court is limited in its review of the Board's unit determinations. Such determinations "are binding upon reviewing courts if grounded in reasonableness." Reasonableness "necessarily implies that the Board has given due consideration to all relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict." *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422-423 (1947).

The Board found, in including the Brackenridge plant in the multi-plant unit that Brackenridge did not differ significantly from other plants in the multi-plant unit. The evidence was clear that the physical location of Brackenridge was not such as to justify deprivation of membership in the multi-plant as the multi-plant unit was not based on any geographical considerations. Second, in items of plant integration, the Board reasonably concluded (and the Court of Appeals concurred) that the two disputed plants possessed the same degree of functional or operational integrating or lack thereof as those already in the multi-plant unit.

The Company strongly contests the Board's finding of a similarity of operations between the multi-plant unit and the other plants in question, claiming that Brackenridge produces a unique type of product (fabricated filmed surface glass). The Third Circuit ruled that "the issue is not whether the skills involved at Brackenridge differ from those found elsewhere in the multi-plant unit, but whether such difference is greater than that found among the other plants." (495 F. 2d at 1201; p. 67a of Petition). Both the Board and the Court of Appeals properly found that those plants already in the multi-plant unit

included a wide variety of techniques and that the inclusion of Brackenridge would not introduce a significant new element of diversity.

As to petitioner's argument that the Board's unit determination in this case is arbitrary, discriminatory and inconsistent, the Court of Appeals responded as does respondent, *supra* at p. 13, fn. 11, that subsequent cases wherein the Board refused to order a new multi-plant unit where clearly factually distinguishable. Accordingly, *Rohm & Haas Co.*, 183 NLRB No. 20 (1970), *Cities Services Oil Co.*, 182 NLRB 12 (1970) and *PPG Industries, Inc.*, 180 NLRB 447 (1969) are all inapposite. Further the above-cited cases were not appealed, hence "the issue of appropriateness was not determined by a Board majority . . . and thus the difference in result between those cases and this is not attributable to a discriminatory application of Board policy." (495 F. 2d at 1202; p. 69a of Petition).

In its "Reasons for Granting the Writ" the petitioner makes the following statement:

> "Use of the unit clarification petition to consolidate pre-existing bargaining units in the absence of changed circumstances rendering the existing units inappropriate obviously erodes the stability of labor relations by inviting unions or employers hoping to improve their bargaining positions by seeking different groupings to upset long established and successful bargaining units." (Petition at 13-14)

However, the petitioner offers absolutely no evidence of any obvious erosion of the stability of labor relations. In fact the Court of Appeals totally rejected this argument below when it said that "the Board correctly finds that a sufficient community of interest exists among the workers

in the proposed unit to ensure that such unit will be viable for bargaining purposes. The fact that inclusion in the multi-plant unit may increase the bargaining power of the Brackenridge employees should not serve as a basis for exclusion." (495 F. 2d at 1203; p. 69a of Petition).

All of this must be viewed against the backdrop of the overwhelming majority of Brackenridge employees who desire to join the multi-plant unit. Accordingly, the citation from Abudeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075, 1098 (1969), quoted by petitioner at p. 17 of the Petition is inapposite. Petitioner states that use of the unit classification procedure to consolidate admittedly appropriate units denies employees their right to choose their representatives and unfairly favors the incumbent union over others. The record here clearly shows that the Brackenridge employees had ample opportunity to choose their representatives. Further they had the opportunity to determine whether they wanted to be in a plant unit or in a multi-plant unit. They overwhelmingly chose the latter. It is inconsistent for petitioner to argue that the Brackenridge employees are being deprived of the right to choose their representatives when it is petitioner who seeks to ignore the result evidenced when they exercised their free choice. Further, as the Court of Appeals noted, there is absolutely no proof that the merger of the two pre-existing units "will inevitably have a significant negative effect upon stability in labor relations". In fact, the record in this case indicates the contrary as the Lathrop plant has been successfully integrated into the multi-plant unit.

> "(T)here is no evidence to suggest that that merger had any adverse impact on the labor relations or operations of either the Lathrop plant or any of the other plants within the multi-plant unit." (495 F. 2d at 1203; p. 70a of the Petition).

CONCLUSION

For the reasons set forth, the petition for certiorari should be denied.

Respectfully submitted,

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On the Brief.

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